79-170

Supreme Court, U. S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES J. RYAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

James J. Ryan v. United States of America, No. 78-1833, April 23, 1979, unpublished order per Circuit rule 35.

JURISDICTION

During certain times in 1971 and 1972, MR. JAMES RYAN was an employee of two Illinois corporations, O'Hare

Installation, Inc., and O'Hare Warehouse, Inc. During this period, these companies allegedly became delinquent with regard to the payment of certain withholding tax payment, although tax returns were timely filed. In July of 1975, the Government garnished MR. RYAN'S wages in an attempt to collect the alleged unpaid portion of the subject withholding tax, relying upon Internal Revenue Code Section 6672.

MR. RYAN filed suit in the U.S. District Court for the Northern District of Illinois to recover his money, and the Government counterclaimed for the remaining amount.

Judgment was entered on the jury verdict against MR. RYAN and in favor of the Government. An appeal to the Seventh

Circuit resulted in the Order of April 23, 1979, reproduced in this Petition, affirming the trial court.

QUESTION PRESENTED FOR REVIEW

Did the jury instructions sufficiently define a "responsible party" relative to IRC Section 6672; and was the jury verdict against the manifest weight of the evidence.

APPLICABLE PROVISIONS OF IRC

Section 6672 of the Internal Revenue Code reads in part as follows:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who wilfully fails to collect such tax, or truthfully account for and pay over such tax, or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a

penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

STATEMENT OF THE CASE

O'Hare Installation, Inc., and O'Hare Warehouse, Inc., were incorporated under Illinois law in the summer of 1971. O'Hare Installations was organized to install carpets, while O'Hare Warehouse was organized for warehousing the carpets. (A13). Both corporations were headquartered at 2300 Devon Avenue, in Elk Grove, Illinois. Although Federal Withholding Tax Returns were filed for O'Hare Warehouse for the quarters ending December 31, 1971 and March 31, 1971, and for O'Hare Installations for the quarters ending September 30, 1971, December 31, 1971, and March 31, 1972, neither corporation paid the amount of

tax due for those periods.

During this period, MR. JAMES RYAN worked for these corporations in sales, and was paid strictly on commission basis. (A10). These corporations ceased doing business in the spring of 1972. Subsequently, the Government attempted to investigate the possibility of collecting the unpaid portion of the tax from MR. RYAN, pursuant to IRS Code Section 6672.

On January 20, 1975, MR. RYAN met with MR. MARK GORDON, of the Appellate Division of the Department of Internal Revenue regarding a possible assessment of tax against MR. RYAN. At that time, MR. GORDON related that a decision had not yet been reached on whether or not an assessment would be made against MR. RYAN.

MR. RYAN had no further communications with the Department until July of 1975, when his wages were garnished. This garnishment was the result of an alleged assessment for withholding taxes which had been fixed against him on January 1, 1975. MR. RYAN filed a law suit against the Government to recover that money. THE UNITED STATES counterclaimed for the remaining amount of the withholding tax, counterclaiming against two additional parties alleged to be responsible persons under IRS Code Section 6672.

At Trial, evidence that Carpet Direct, Inc., a Corporation located in Mt. Prospect, Illinois and engaging in the retail sale of carpet, wrote certain checks to satisfy some of the obligations of both O'Hare Installations and O'Hare Warehouse

was admitted over the objection of Plaintiff's Counsel. (A29, A30, and A31). No evidence was offered or admitted at Trial that a demand for the taxes was made on O'Hare Warehouse or O'Hare Installations or that these taxes were at anytime uncollectable against said corporations.

Judgment was entered on the jury's verdict, dismissing Plaintiff's Complaint against the UNITED STATES and ordering that the Government recover of the Plaintiff, $16,520.14 plus interest and costs. Plaintiff's Post Trial Motion for a new trial was denied, and it is from that Order which Plaintiff now Appeals.

ARGUMENT

In determing whether an employee is a "responsible party" under IRC Section 6672, the Court is to look at the facts in each case. Plaintiff cited several cases in his brief showing where persons, who had much more authority over what bills were to be paid, and who also were co-signers on certain corporate accounts, were not found to have the ultimate authority over policy decisions of the company and expenditures of its funds to be held responsible under the statute. Bauer v. United States, 543 F. 2d 142; White v. United States, 372 F. 2d 513; Bernardi v. United States, 507 F. 2d 682.

These cases also hold that mere negligence in failing to ascertain facts

regarding a tax delinquency is insufficient to constitute willfulness under the code.

The cases cited by Plaintiff were neither distinguished nor contradicted by Defendant or by the Seventh Circuit Court of Appeals.

The Court rejected the jury instructions pertaining to the negligence aspect of the definition of willfulness which Plaintiff offered. The Court overruled Plaintiff's objections to Defendant's jury instructions which did not incorporate the negligence aspect of the definition of willfulness.

By not incorporating the complete definition of a responsible person relevant to IRC 6672 in the jury instructions, the trial Court committed

reversible error. The Seventh Circuit Court of Appeals erroneously affirmed the decision when it refused to talk to the cases and authority cited in Plaintiff's brief.

CONCLUSION

Petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

JOHN C. AMBROSE
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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued April 20, 1979)

April 23, 1979

Before
Hon. Philip W. Tone, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Gus J. Solomon, Sr. District Judge*

JAMES J. ..YAN, Plaintiff-Appellant,	)Appeal from the) United States) District Court of
No. 78-1833 vs.	) Illinois,) Eastern Division
UNITED STATES OF AMERICA, Defendant-Appellee.	)No. 75-C-3252
	)George N.) Leighton, Judge.

O R D E R

The evidence supports the finding that the notice requirements of the statute were satisfied (and appellant's failure to argue in his brief that this issue

should have been submitted to the jury waives that argument). Assuming appellant is arguing that the evidence is insufficient to show that he was a controlling person, that argument is without merit. The admission of evidence and instructions to the jury concerning checks issued by Carpet Direct, Inc. were proper in view of the government's theory that appellant, who controlled all three companies, chose to use for another purpose resources that could have been made available for payment of the tax. Accordingly, the judgment is affirmed.

AFFIRMED

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* The Honorable Gus J. Soloman, Senior District Judge of the United States Court for the District of Oregon, is sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES J. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-170

JAMES J. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this federal tax refund suit petitioner challenges the decision below upholding an assessment against him for personal liability for unpaid withholding taxes of the corporations pursuant to 26 U.S.C. 6672, on the grounds that the jury instructions did not adequately describe the willfulness requirement of the statute and that the verdict was not supported by the evidence.

The pertinent facts may be summarized as follows: O'Hare Installations, Inc., and O'Hare Warehouse, Inc., the two corporations whose unpaid withholding taxes are involved here, were organized in 1971, along with a third corporation, Carpet Direct, Inc., as part of an integrated

business operation, to conduct the various phases of the business of selling, storing and installing carpeting and other flooring (Tr. 58-59, 208)[1]

O'Hare Warehouse and O'Hare Installations conducted business from the time of their formation to 1972 until serious financial difficulties finally forced them to cease operations. During the last several months of their existence, both corporations filed employer's quarterly federal tax returns which showed withholding taxes due, but did not pay those taxes. The Commissioner determined that petitioner was a person responsible for the collection and payment over of the withholding taxes of both corporations, and, accordingly, imposed personal liability for the unpaid taxes pursuant to 26 U.S.C. 6672. Petitioner paid a portion of the assessment and, upon the Commissioner's denial of his claim for a refund, commenced this action in the United States District Court for the Eastern District of Illinois, seeking a refund of the amount paid and an abatement of the remaining portion of the assessment (R. 1). The jury returned a verdict finding petitioner personally liable for the withholding tax and the district court entered a judgment in accordance with the verdict. (R. 35). The court of appeals affirmed (Pet. App. 1a-2a).

1. The court of appeals correctly held that the evidence was sufficient to support the jury's verdict that petitioner was liable for his corporation's unpaid withholding taxes. The record shows that petitioner was a person required to collect and pay over the withholding taxes of O'Hare

[1] "R." refers to the record appendix filed in the court of appeals. "Tr." refers to the transcript of the proceedings in the district court, and "GX" refers to Government exhibits introduced at trial.

Warehouse, Inc. and O'Hare Installations, Inc., because he had both the authority and the opportunity to apply corporate funds to satisfy the tax liability. See *Adams* v. *United States*, 504 F. 2d 73 (7th Cir. 1974); *Monday* v. *United States*, 421 F. 2d 1210 (7th Cir. 1970). Contrary to his claim (Pet. 5) that he was merely a salesman for the corporations, the evidence showed that petitioner participated in a wide variety of business transactions on behalf of the corporations, including the negotiations of the lease for their office space, the negotiations of a warehousing agreement, and the execution of a guarantee of indebtedness to secure a line of credit on behalf of both corporations. In business transactions, he often represented that he was an officer of those corporations. Moreover, petitioner was primarily responsible for the hiring and firing of corporate employees, and was authorized to draw checks, on his sole signature, on the bank accounts of Carpet Direct, Inc., from which the bulk of the expenses of the other two corporations were paid (Tr. 211, 218; GX 29, 30, 31, 32). He was described (Tr. 221, 264) as "the general overseer of the * * * whole organization," and "the brains behind the organization."[2]

The evidence also supports the verdict that petitioner willfully caused the corporations to be unable to meet their withholding tax obligations. For purposes of Section 6672, "willful" requires only that the actions of the responsible person obligated to pay the corporation's

[2] *Bauer* v. *United States*, 543 F. 2d 142 (Ct. Cl. 1976), *Bernardi* v. *United States*, 507 F. 2d 682 (7th Cir.), cert. denied, 422 U.S. 1042 (1975), and *White* v. *United States*, 372 F. 2d 513 (Ct. Cl. 1967), upon which petitioner relies (Pet. 8), do not support his claim that he was not a responsible officer. As petitioner acknowledges (Pet. 8), the determination of the existence of a duty to pay over taxes withheld from the wages of corporate employees turns largely on the facts of each case. See *Bauer* v. *United States*, *supra*, 543 F. 2d at 148.

withholding taxes, were voluntary, conscious, and intentional. *Sorenson* v. *United States*, 521 F. 2d 325, 327 (9th Cir. 1975); *Adams* v. *United States*, *supra*; *Monday* v. *United States*, *supra*. The person who signed the corporate tax returns (Edward Foley) testified that at the time the tax returns for the periods in question were prepared, he discussed with petitioner the fact that corporate funds were insufficient to meet the withholding tax obligations shown on the returns. Nevertheless, the corporations continued to pay the full amount of their employees' net wages at a time when they had insufficient funds to pay the withholding tax obligations incurred on those wages, as well as various other expenses of the corporations, such as the rent on the building in which their offices were located.

2. Contrary to petitioner's contention (Pet. 8-10), the trial court's instructions to the jury adequately described the willfulness requirement of Section 6672, for purposes of civil tax liability. They leave no room for speculation that the jury might have been misled into believing that liability under Section 6672 may be based upon mere negligence. The court defined the term "willfully" as meaning that "the act of failing to pay over the taxes was voluntarily, consciously, and intentionally done" (R. 53) and stated that in order to find that petitioner acted willfully, they must find that he "made the deliberate choice to pay other creditors instead of paying the Government" (R. 53). The accuracy of the instructions is illustrated by the court's final statement that "[a]ll that is required for you to find the responsible officer acted

willfully is that he knew the taxes were due and owing, funds were available, and did not pay the funds over to the Government" (R. 56).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-09